LIM CHAI OON & ANOR.

v.

NORMAH BT ISMAIL (WIDOW) SUING ON BEHALF OF HERSELF AND SEVEN MINORS AS DEPENDANTS OF FADZIN BIN ABU & ANOR.

HIGH COURT, JOHOR BAHRU
DATO' JAMES FOONG J.
[CIVIL APPEAL NO. 12-40-91]
28 MAY 1994

TORT: Dependency claim - Damages - Principles to be applied - Deceased was 50% to be blamed for accident - Whether dependants entitled to damages based on 100% liability - Whether damages to be apportioned - Civil Law Act 1956 (Revised 1972) ss. 7, 12(4).

TORT: Dependency claim - Sum for dependency loss agreed upon - Dependant earning income from property left by deceased - Whether earnings amounted to benefits derived from deceased's death - Whether deduction thereof to be made.

PRACTICE & PROCEDURE: Dependency claim under s. 7 Civil Law Act - Apportionment of award - Whether deceased's estate to be made a party - Civil Law Act 1956 (Revised 1972) s. 12(4).

On 1 May 1988 a collision occured between a motorcar driven by the first appellant and owned by the second appellant and a motorcycle ridden by one Fadzin bin Abu (deceased), with the second respondent, his daughter, riding pillion. As a result of the accident the deceased succumbed to death and in consequence thereof the first respondent, the deceased's widow, sued the appellants on dependency claim for herself and her seven children under s. 7 Civil Law Act 1956 (Revised 1972). The Sessions Judge, Kota Tinggi made a finding of fact that both the deceased and the appellants were 50% - 50% to be blamed for the motor accident but following the principle expounded in *Veronica Joseph (f) an infant & Anor v. Tu Kon Lin & Anor* [1987] 1 CLJ 81, awarded damages to the first respondent based on 100% liability.

Both parties agreed that RM500 per month was to be the sum for dependency loss at the time of the deceased's death. The facts showed however that after the said accident the first respondent took over the Felda estate of her deceased husband and from her toil thereon derived a nett monthly income of RM425. The Sessions Judge awarded RM300 per month dependency loss to the respondent and in so ordering, had clearly not considered the aforesaid income for any deduction to the agreed sum. The appellants appealed and the issues that arose were:

(1) Whether on proper reading of s. 12(4) Civil Law Act the first respondent herein, being a dependant, was subjected to a reduction in damages according to the percentage of liability attributed to the deceased in the said motor accident.
(2) Whether deduction should be made to dependency loss when there was evidence to show that the dependant had derived benefits from the deceased' death.

Held:

[1] Section 12 (4) Civil Law Act 1956 (Revised 1972) clearly states that in an action brought by a dependant under s.7 of the Act, damages recoverable by the dependant shall be reduced proportionately to the extent of the deceased's fault in the accident. The Sessions Judge had therefore erred in awarding damages based on a 100% liability to the first respondent. The award should be reduced by 50% which is the proportionate blame attributed to the deceased.

[2] There is no ambiguity in the wordings of s.12(4) Civil Law Act and to impose other requirements which are not therein stated would tantamount to writing foreign provisions into a statute. This function is certainly not within the parameters of the functions of the judiciary whose duty is to interpret the law as stated by the legislature. This being the position, the enunciation in *Veronica Joseph (f) an infant & Anor v. Tu Kon Lim & Anor* [1987] 1 CLJ 81 that in situations and claims of this nature the deceased's estate is to be made a party and be heard before making apportionment of award is erroneous and cannot therefore apply.

[3] The case of *Maxfield v. Llewellyn* [1961] 3 All ER 95, used as a supportive authority by *Veronica's* case in expounding the principle in question, is not applicable to the situation expressed in s. 12(4) Civil Law Act. Unlike in *Maxfield*, there is no question of the deceased position not being considered in a dependency claim under s. 7 of the Act. The reason being that the dependency claimant, in order to succeed, has to prove negligence of the defendant and in so doing, evidence would have been tendered on the position of the deceased in the accident. Further, when a conclusion on liability is arrived at by the trial Judge, inevitably, the position of the deceased would have been

considered, just as in the present case where the deceased was found to be 50% to be blamed. Under the circumstances, no purpose is served by bringing the deceased estate as a party to the action before apportioning the dependency sum under s. 12(4) of the Act, as suggested in *Veronica's* case.

[3] The case of *Mallet & Anor v. Dunn* [1949] 1 All ER 973, relied further by *Veronica's* case for the principle it expounded, should be distinguished for the reason that s. 12(4) of the Civil Law Act had not been considered in that case. What was considered therein was only the question of contributory negligence involving s. 1(1) of the English Law Reform (Contributory Negligence) Act 1945 which is identical to our s. 12(1) Civil Law Act. No mention whatsoever was made of s. 5 of the Fatal Accident Act 1976 which is para material to our s. 12(4) Civil Law Act.

[4] It is an accepted general principal that benefits accruing to the dependant by reason of a deceased's death should be taken into account to reduce dependency claim. However, these benefits should not be derived at the expense and effort of the dependant. In this case the first respondent continued to toil the deceased's Felda estate and it was due to her own industry that she managed to earn RM425 a month. As this earning is a result of her own labour and not resulting from the deceased's death, the money should not be deducted from the dependency loss.

[5] There is no necessity for the first respondent as a house wife to work since there is no law to insist upon the dependants to mitigate their losses. In the instant case it is clear that even if the first respondent did not carry out the work on the Felda estate, she would still be entitled to the agreed dependency loss of RM500 per month. In the premises the dependency sum should be replaced with RM500 per month instead of RM300 per month awarded by the Sessions Judge.

Per curiam:

Virtually in all cases of this nature, beneficiaries of the estate consist of the same set of people as the dependency claimants. As there should be no multiplicity of suits on the same subject matter, the proposed practice stated in *Veronica's* case should not be encouraged.

[Appeal allowed. Order of the Sessions Judge varied accordingly].

Cases referred to:
Veronica Joseph (f) an infant & Anor. v. Tu Kon Lin & Anor. [1987] 1 CLJ 81 ***(not foll)***
Maxfield v. Llewellyn [1961] 3 All ER 95 ***(dist)***
Mallet & Anor. v. Dunn [1949] 1 All ER 973 ***(dist)***
Davis & Anor. v. Powell Duffryn Associated Collieries Ltd. [1942] 1 All ER 657 ***(refd)***
Yap Ami & Anor. v. Tan Hui Pang [1982] 2 MLJ 316 ***(dist)***
Goodger v. Knapman [1924] S A SR 347 ***(foll)***
Howitt v. Heads [1973] 1 QB 64 ***(cit)***

Legislation referred to:
Civil Law Act 1956, ss. 7, 12(1), (4)
Fatal Accident Act 1976, s. 5 (UK)
Law Reform (Contributory Negligence) Act 1945, s. 1(1) (UK)

For the appellants / defendants - Kumar; M/s. Rina Noor & Co.
For the respondents / plaintiffs - Gunasegaran; M/s. John Ang & Jega

JUDGMENT

James Foong J:
This is an appeal by the defendants against the decision of the Sessions Court Judge who:

(a) awarded damages to the 1st plaintiff based on 100% liability against the defendants even though, the Court has found both the defendants and the deceased husband of the 1st plaintiff 50% - 50% to be blamed for the motor accident and;
(b) awarded a sum of RM300 per month as dependency loss to the 1st plaintiff without making any deduction to the benefits she derived from her deceased husband's death.

The facts of this case are not disputed and neither is the finding on liability by the trial Judge. It is as follows; on 1 May 1988 a collision occurred between a motorcar driven by the 1st defendant and owned by the 2nd defendant with a motorcycle ridden by one Fadzin bin Abu (deceased) with the 2nd plaintiff, his daughter as a pillion rider. As a result of this accident the deceased succumbed to death while the 2nd plaintiff was seriously injured. The 1st plaintiff, the widow of the deceased brought this action against the defendants on a dependency claim for herself and seven of her children under s. 7 of the Civil Law Act 1956 (Revised 1972).

The Sessions Court Judge found that the 1st defendant and the deceased were equally be blamed for the said accident. However, as bound by a High Court decision in the case of *Veronica Joseph (f) an infant & Anor. v. Tu Kon Lin &*

Anor. [1987] 1 CLJ 81, the Sessions Court Judge awarded damages to the 1st plaintiff based on 100% liability. In respect of quantum, besides special damages and other items agreed upon, the Sessions Court Judge found a sum of RM300 per month as the amount for dependency loss due to the 1st plaintiff.

In this appeal, Counsel for both the defendants and the plaintiffs agreed that there are only two issues for this Court's consideration.

The first is whether the 1st plaintiff being a dependant is subjected to a reduction in damages according to the percentage of liability attributed to the deceased in the motor accident. The second is whether a deduction should be made to the dependency loss when there is evidence to show that dependant has derived benefits from the deceased's death.

On the first issue, the defendants relied on s. 12(4) of the Civil Law Act. Section 12(4) reads as follows:

> Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly if an action were brought for the benefit of the estate under s. 8, the damages recoverable would be reduced under subsection (1), any damages recoverable in any action brought for the benefit of the dependants of that person under proviso (iii) of subsection (3) or s. 7 or of the spouse or parents under subsection (3B) of s. 7 shall be reduced to a proportionate extent.

It is the contention of the defendants' Counsel that in the second limb of s. 12(4) above, the law clearly provides that any damages awarded for the benefit of any dependant who brought an action under s. 7 of the said Act, the same should be reduced proportionately to the extent of the deceased's liability (if any) in an accident. In this case, the action by the 1st plaintiff is brought under s. 7 of the said Act and, there is a finding by the trial Judge that the deceased is 50% to be blamed for the accident that causes his own death. Under such circumstances, the award to the 1st plaintiff should be proportionately reduced by 50% and not based on 100% liability against the defendants.

The defendants' Counsel proceeded to argue that the case of *Veronica* which the trial Judge relied on is wrong in law and contradicts the clear provision of s. 12(4) of the Civil Law Act.

Section 12(4) of the Civil Law Act clearly states that in an action brought by a dependant under s. 7 of the same Act, damages recoverable by the dependant shall be reduced proportionately to the extent of the deceased's fault in the accident. There is no ambiguity in the wordings of this particular section of the Act which expressly provides for application to claims made both under ss. 7 and 8 of the Civil Law Act. To impose any other requirements which are not stated in this particular section of the Act, would tantamount to writing into a statute by the Courts provisions which do not exist therein. This is particularly so with the requirement of having the deceased estate made a party and/or be heard before apportionment of award in situations mentioned above can be made as indicated in *Veronica's* case. This function is certainly not within the parameters in the judiciary, whose duty is to interprete the law as stated by the legislature. Failure to adhere to this function would result in the collapse of the principle on the separation of powers between the executive, legislature and the judiciary which is practised in our country.

The case of *Maxfield v. Llewellyn* [1961] 3 All ER 95 used as a supportive authority for the principle expounded in *Veronica's* case is not applicable to the situation expressed in s. 12(4) of the Civil Law Act. In *Maxfield v. Llewellyn* the widow of the deceased pillion rider of a motorcycle brought an action against the driver and owner of a cattle truck that went into the path of the deceased's motorcycle, collided into him and caused his death. Also named as defendants in this action were the driver and owners of a post office van, which van was parked in such a manner that could have caused the cattle truck to proceed onto the path of the oncoming deceased's motorcycle. The trial Judge awarded dependency loss based on 100% liability of the cattle truck. The driver and owner of the cattle truck appealed on the ruling that no contributory negligence was decided against the post office van. The House of Lords ruled that,

> there cannot be apportionment unless all parties are before the Court or, at any rate unless the action of all parties are considered. - Omerod LJ at p. 97.

By this the House of Lords were actually referring to the absence of the rider (as differ from pillion rider whose widow wife was the plaintiff in the action) of the motorcycle as a party to the action. The rider who also succumbed to death as a result of this road accident was not named either as a plaintiff or defendant in the action.

It was the view of the House of Lords that unless all parties are before the Court, apportionment of damages should not be considered.

In situation such as in our present case there is no question of the deceased position not being considered. The dependency claimant in order to succeed has first to prove negligence of the defendant. By so doing, evidence would have been tendered on the position of the deceased in the accident. When a conclusion on liability is arrived at by the trial Judge, the position of the deceased would have been considered. In our present case, the deceased was found 50% to be blamed. Under these circumstances, I see no purpose being served by having to bring the deceased estate, as suggested in *Veronica's* case as a party to this action before apportionment of a dependency sum can be made under s. 12(4) of the Civil Law Act.

In addition, virtually in all cases of this nature, the beneficiaries of the estate consist of the same set of people as the dependency claimants. As there should be no multiplicity of suits on the same subject matter, the proposed practice stated in *Veronica's* case should not be encouraged.

The other supportive authority for the principle expounded *Veronica's* case is *Mallet & Anor. v. Dunn* [1949] 1 All ER 973. It is the opinion of this Court that s. 12(4) of the Civil Law Act was not considered in *Mallet & Anor. v. Dunn*. *Mallet & Anor. v. Dunn* only considered the question of contributory negligence that is s. 1(1) of the English Law Reform (Contributory Negligence) Act 1945 which is identical to our s. 12(1) of the Civil Law Act. No mention whatsoever was made to s. 5 of the Fatal Accident Act 1976 which is para material to our s. 12(4) of the Civil Law Act. Possibly this particular provision was not enacted in England at material time when this case was decided. When such a relevant piece of law is not being considered, this case should be distinguished.

For reasons stated above, this Court finds that the Sessions Court has erred in awarding the 1st plaintiff damages based on a 100% liability. This award of damages should be reduced by 50% which is the proportionate blame attributed to the deceased in accordance with s. 12(4) of the Civil Law Act.

I shall now turn to the second issue. As a result of the deceased's death, the 1st plaintiff took over the Felda estate of her deceased's husband. After paying expenses, she obtained a nett income of RM425 per month from it.

The defendants submitted that this sum of RM425 is a benefit accruing to the 1st plaintiff as a direct result from the death of the deceased and, should be taken into account to reduce the dependency claim following the decision handed down by the House of Lords in *Davis & Anor. v. Powell Duffryn Associated Collieries Ltd.* [1942] 1 All ER 657. As the sum of RM500 is agreed upon by the parties to be the dependency loss at time of deceased's death, a deduction of RM425 should be made thereto. By this the dependency sum would be reduced to RM75 per month. In further support for this contention, the defendants tendered to this Court the case of *Yap Ami & Anor. v. Tan Hui Pang* [1982] 2 MLJ 316. In *Yap Ami's* case, after the death of the deceased, the dependant widow of the deceased continued to receive the same amount of money as the deceased had been getting from the firm which the deceased was a partner. The High Court ruled that she suffered no loss and as such was not entitled to compensation.

It is an accepted general principle that benefits accruing to the dependant by reason of a deceased's death should be taken into account to reduce dependency claim. However, these benefits should not be derived at the expense and effort of the dependant. In this case, the 1st plaintiff widow proceeded to manage the deceased Felda estate and due to her own ability, ingenuity and industry she managed to earn RM425 per month. There is no necessity for her as a house wife to work since, in a dependency claim there is no law to insist upon the dependants to mitigate their losses. If the 1st plaintiff did not carry out the work on the Felda estate, she would still be entitled to the dependency loss of RM500 per month. In this case as she did work by virtually toiling the land with her own hands, the money she earn should not be deducted from the dependency loss. This earning of the 1st plaintiff is a result of her own labour and not a gain resulting from the deceased's death.

This principle is similar to that adopted in the Australian case of *Goodger v. Knapman* [1924] S A SR 347, where Murray CJ remarked that:

> I am unable to see how liberty to work can be reasonably brought within the description of a pecuniary advantage she had derived from the

death of her husband. Any money she might earn, would be the result of her labour and not of his death...

This principle also found favour in the English case of *Howitt v. Heads* [1973] 1 QB 64.

Yap Ami's case cited by the defendants' Counsel ought to be distinguished from the facts of the case itself. In that case, the dependant widow did not expend any effort or energy of her own in getting the payment from her deceased husband's former firm. The firm just continued to pay the dependant widow in the same amount and manner as if the deceased's husband was still alive. She did not even 'lift a finger to earn that amount'. However, in our present case the situation is otherwise.

Under these circumstances, I reject the defendant's second contention.

In the light of this Court's findings aforesaid, I allow this appeal with cost and vary the order of the Sessions Court Judge to as follows:

(a) the dependency sum should be replaced with a sum of RM500 per month instead of RM300.

(i) As a multiplier for pre-trial loss of dependency is agreed upon on 36 months, the sum to be awarded for pre-trial loss for the 1st plaintiff should be RM500.00 x 36 = RM18,000.00;

(ii) As a multiplier for post-trial loss of dependency is agreed upon on 72 months, the sum to be awarded for post-trial loss to the 1st plaintiff should be RM500.00 x 72 = $36,000.00.

(b) There should be no change in the award for special damages which were agreed upon by the parties at RM11,800 to the 1st plaintiff;

(c) the above sums for both general and special damages should be reduced to 50% and paid by the defendants to the 1st plaintiff together with interest and cost as stated by the Sessions Court.

As for the 2nd plaintiff there should be no change in Sessions Court order for awards granted to her are not affected by this appeal.

MALAYAN UNITED FINANCE BERHAD

v.

WILTEX (M) SDN BHD & 6 ORS.

HIGH COURT, KUALA LUMPUR
DATO' DR. ZAKARIA BIN MOHD YATIM J.
[SUIT NO D4-23-2524-87]
25 FEBRUARY 1994

PRACTICE AND PROCEDURE: Summary judgment - Order 14 RHC 1980 - Appeal - Illegality of contract - Illegality not pleaded in statement of defence but raised in appeal - Whether Court bound to consider question.

BANKING & FINANCE: Loan transaction by finance company - Loan secured by first legal charge over land - Finance company disbursed loan prior to execution of charge - Whether loan amounted to unsecured advances - Whether transaction thereof illegal - Section 20(1) Finance Companies Act 1969.

The plaintiff in this case is a licensed finance company. By a letter of offer dated 14 August 1984 the plaintiff offered the first defendant a loan of RM 540,000 on condition that the first defendant execute a first legal charge over a certain property and the second to the seventh defendants execute a joint and several guarantee in respect of the loan. The said offer was accepted by the first defendant on 22 August 1984.

By two seperate disbursements made on 13 February 1985 and 22 October 1985 respectively, the plaintiff released the whole of the loan to the first defendant. By this time however, the charge over the aforesaid property had yet to be executed by the first defendant and so also the letter of guarantee by the other six defendants. Execution of the two instruments was effected only on 31 December 1985. The first defendant defaulted in payment and in the subsequent O. 14 application by the plaintiff the Senior Assistant Registrar gave the plaintiff liberty to enter summary judgment against all the seven defendants.

The defendants appealed and argued that this was not a proper case for summary judgment as the loan transaction was tainted with illegality by reason of s. 20 of the Finance Companies Act 1969 which expressly prohibited the grant of unsecured advances. The defendants did not however plead the question of illegality in their statement of defence and the issue that arose